United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4251

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DEVEN LITHOGRAPHERS, INC. AND
CAVALIER MULTICOLOR CORP.,
Respondent.

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P/S

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUE PRESENTED

Whether the Board properly overruled the Company's objections to the election conducted among the Company's employees, certified the Union as collective bargaining representative, and found that the Company violated Section 8(a)(5) of the Act by refusing to bargain with the Union.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C.

Sec. 151, et. seq.), for enforcement of its order (A. 13-14) issued[1/] against Deven Lithographers, Inc. and Cavalier Multicolor Corp. (hereafter "the Company") on June 10, 1976. The Board's Decision and Order is reported at 224 NLRB No. 95. This Court has jursidiction over the proceedings, the unfair labor practice having occurred at Long Island City and Brooklyn, New York.

I. THE BOARD'S FINDINGS OF FACT

The Company is a New York corporation engaged in the manufacture and sale of printing materials and related products at their locations in Long Island City and Brooklyn, New York (ALJD 3; 89). On August 12, 1974, Local One, Amalgamated Lithographers of America (herein "the Union") filed a petition with the Board requesting certification as collective bargaining representative of certain of the Company's employees (A. 41; 90). On August 27, 1974, the Company and the Union executed a Stipulation of Certification Upon Consent Election in a unit consisting of all lithographic production employees of the Company, excluding all office clerical employees, sales employees, guards, watchmen, and supervisors as defined in the Act (A. 42-43; 90). Pursuant to this stipulation, an election by secret ballot was conducted on September 23, 1974. The Union won by a vote of 16 to 7, with 3 ballots challenged in a unit of 27 eligible voters (A. 81; 90).

1/ "A." references are to the printed appendix; "GCX" references are to the General Counsel's Exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

On September 30, 1974, the Company filed timely objections to the conduct of the election and to the Union's conduct affecting the results of the election (A. 47-48; 94). The Company alleged the following: (1) that employees were included in the voter eligibility list for the election who were not "lithographic production" employees; (2) that "supervisors" within the meaning of the Act had been included in the unit; (3) that a "supervisor" had acted as an observer for one of the parties at the election and his presence violated the "laboratory conditions" required by the Board for elections; (4) that the NLRB agent in charge of the election misled observers regarding their duties under the Board's rules and regulations; (5) that the NLRB agent in charge of the election left the ballot box unattended for a sufficiently long period of time that it was susceptible to being tampered with by others; and (6) that the Union made written and oral misrepresentations to the employees participating in the election, and the misrepresentations were likely to be acted upon and were made at such a time and place that it was impossible for the employer to respond to them (A. 47-48; 97). Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8(29 C.F.R.), the Board's Regional Director for Region 29 undertook an administrative investigation of the Company's objections (A. 49-62; 97). After the investigation, the Regional Director concluded that the objections lacked merit and recommended that the Board certify the Union as representative of the employees in the unit (A. 49-62; 97).

On January 17, 1975, the Company filed a Motion for Reconsideration and for Hearing on its third objection, namely, that a supervisor had acted as an observer at the election (A. 65-71;.98). The Regional Director determined that the Company had presented no new evidence in support of the motion and denied reconsideration and a hearing (A. 72; 98). Following the Company's timely exceptions and appeal, on June 6, 1975 the Board adopted the findings, conclusions, and recommendations of the Regional Director and certified the Union as bargaining representative in the appropriate unit (A. 3, 79-80; 98).

On June 10, 1975, Union Representative Frank J. Casino, Jr. called the Company president, Edward Gambella, to request bargaining (A. 3; 103). He was unable to speak with Gambella, despite repeated attempts, until June 19. On that date Gambella returned Casino's call and told him he could not discuss bargaining until he communicated with his attorney (A. 3; 105). Casino contacted Gambella again on August 14 and was told by Gambella: "I thought I told you to contact my attorney" (A. 3; 106). Casino reached the attorney, Hugh P. Husband, Jr., on August 25, and was informed that Gambella wanted to pursue further litigation of the dispute (A. 3; 107). The Company and the Union stipulated at the hearing that Respondent refused to bargain with the Union and intended to further litigate the validity of the Board's certification of the union (A. 3; 100).

The Union filed unfair labor practice charges on September 4, 1975, and on October 31 the General Counsel issued a complaint alleging that the Company had violated Section 8(a)(5) of the Act by refusing to bargain with the Union (A. 26, 29-35; 93). The General Counsel also alleged a violation of Section 8(a)(3) in the discharge of employee Henry C. Aleksiewicz, but this charge was dismissed by the Administrative Law Judge on March 24, 1976 (A. 8). In addition, the General Counsel alleged that Respondent's bad faith delay of two and one-half months between the Union certification and Respondent's unlawful refusal to bargain itself constituted a separate violation of Section 8(a)(5) of the Act. (A. 4; 92).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Company violated Section 8(a)(5) of the Act when it refused to bargain with the properly certified representative of its employees (A. 13-14). The Board affirmed the Administrative Law Judge's dismissal of the Section 8(a)(3) charge, and did not pass on the issue of whether the two and one-half month delay in Respondent's unlawful refusal to bargain was occasioned by bad faith, noting that a finding of a separate and distinct violation of Section 8(a)(5) would not affect the Board's remedy and order.

The Board's order requires the Company to cease and desist from refusing to bargain collectively with the Union and from interfering with its employees' Section 7 rights in any like or related manner.

Affirmatively, the order directs the Company to bargain with the Union upon request and to post the customary notices. To assure the employees of the services of their selected bargaining representative for a full year, the order provides that the initial certification period will begin on the date that the Company commences bargaining in good faith with the Union. (A. 9.)

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) OF THE ACT BY REFUSING TO BARGAIN WITH THE DULY CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES

A. Introduction

The Company concededly has refused to bargain with the Union, alleging as the sole ground for its refusal that the Union's certification is invalid because the Board should have upheld its objections to the election. Thus, if the Board properly certified the Union, the Company clearly violated Section 8(a)(5) of the Act "unless the Company can shoulder the 'heavy burden' of establishing that the Board abused its discretion in certifying the election." N.L.R.B. v. Newton-New Haven Co., 506 F.2d 1035, 1036 (C.A. 2, 1974). Since "Congress has entrusted to the Board considerable latitude in reviewing disputes concerning representation", the Court's "task is to determine whether the Board has acted arbitrarily in the exercise of its 'wide degree of discretion'" in overruling the Company's election objections. Harlan #4 Coal Co. v. N.L.R.B., 490 F.2d 117, 120 (C.A. 6 1974), cert. denied, 416 U.S. 986 (1974). Accord: N.L.R.B. v. A.J. Tower Co., 329 U.S. 324, 330 (1946); N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969); Bausch and Lomb, Inc. v. N.L.R.B., 451 F.2d 873, 877 (C.A. 2, 1971). We show below that the Board acted well within its discretion when it overruled the Company's election objections.

The Company has indicated it intends to waive its previous Objections numbered 1, 2, 4, and 6, leaving as the sole issues on appeal Objections No. 3 and 5.

B. The Board Properly Overruled Objection 3

In Objection 3 the Company alleged that:

> An employee who was a "supervisor" within the meaning of the Act acted as an observer for the Union at the election, and his presence violated the laboratory conditions required by the Board for elections.

In support of this objection the Company claimed that an employee named Aleksiewicz, who voted in the election and acted as an observer for the Union, was a supervisor within the meaning of the Act. An examination of the relevant facts revealed that the Company, through its attorney, proposed a list of employees eligible to vote in the election and included Aleksiewicz's name on the list, as well as the name of the Company vice-president, who was later challenged by the Union and was not allowed to vote. On August 27,1974, representatives of the Company and the Union attended a conference at the Regional Office of the Board and entered into a Stipulation for Certification upon Consent Election. Although the appropriate unit specifically excluded all supervisors, the Company advanced no facts at this meeting which would alert either the Union or the Board to Aleksiewicz's supervisory status. The Union accepted the list prepared by the Company as the unit of lithographic and production workers engaged in preparatory and press work and stipulated with the Company that all those named on the list were eligible voters.

On September 23, 1974, the Board conducted an election in two sessions, one at each of the Company's locations. At the first voting session the eligible voters assembled in the press room. The Union agent asked for a volunteer to act as an observer for the Union, and, after a pause, Aleksiewicz said "well, if nobody else will do it I will be an observer" (A. 52; 103). Aleksiewicz was then designated as the observer for the Union in the

presence of the Board agent, Company President Gambella, the Company's observer, and the assembled eligible voters. Aleksiewicz acted as observer for the Union at the first voting session, and another employee performed the observer's role at the second session. Neither the Company's president nor its observer raised any objection at that time to Aleksiewicz as an observer for the Union. Moreover, the Company did not challenge Aleksiewicz's vote in the election.

The Company's claim that Aleksiewicz was a supervisor within the meaning of the Act,[2/] and that his participation tainted the election surfaced for the first time after the tally of ballots indicated that a substantial majority had voted for the Union. Until that point, the Company apparently considered it advantageous to have one of its supervisors participate in the election, and included Aleksiewicz's name on the eligibility list it prepared.[3/]

2/ Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

3/ The Company contends that it was not aware of the Act's definition of "supervisor" even though it had the advice of its own attorney at the time it submitted the eligibility list, which included Aleksiewicz's name. The Company states that had it known Aleksiewicz was a "supervisor", it would not have included his name on the list. Paradoxically, the Company argues that its employees surely knew that Aleksiewicz was a "supervisor", and their fear of his possible reprisals coerced them to vote for the Union. It is improbable at best that the employees would know Aleksiewicz's status and be coerced by its implications in the election when the Company claims ignorance on the same question. The Company's inconsistent stance on knowledge of Aleksiewicz's status effectively negates any inference that the employees were improperly influenced by his participation in the election.

It is well established that when an employer is aware of pre-election activities on the part of a supervisor in favor of a union and the employer takes no steps to dissipate the effect of such activities, he may not later rely on the supervisor's conduct as a basis for setting aside an election. N.L.R.B. v. Air Control Products of St. Petersburg, Inc., 335 F.2d 245, 250 (C.A. 5, 1964). It is only "advocacy of the Union by supervisory personnel, 'unknown to the employer, [that] is cause for annulment of the election.'" Ibid., quoting from N.L.R.B. v. Lord Baltimore Press, Inc., 300 F.2d 671, 673 (C.A. 4, 1962). The court in Air Control Products, supra, drew a sharp distinction between supervisory advocacy of a union which the employer knows of and that of which he is not aware. If elections could be set aside in the former situation, the court stated: "we would . . . be allowing the Employer to take advantage of wrongdoing for which he has an operational responsibility." Ibid. Accord: N.L.R.B. v. Decatur Transfer and Storage, Inc., 430 F.2d 763, 764 (C.A. 5, 1970); N.L.R.B. v. Lamar Electric Membership Corp., 362 F.2d 505, 506-507 (C.A. 5, 1966); N.L.R.B. v. Douglas County Electric Membership Corp., 358 F.2d 125, 130 (C.A. 5, 1966).

In the instant case the Regional Director investigated the Company's objections and, without making a finding as to Aleksiewicz's status as a supervisor, found that his participation as an election observer did not prevent a fair election. Assuming that Aleksiewicz was a supervisor within the meaning of the Act, the Company's failure to identify him as such when it submitted the eligibility list, its failure to object to his action as a Union observer, and its failure to

challenge his vote in the election, now preclude it from objecting to his participation in the election. "If an employer is aware of a supervisor's Union activities and then stands idly by, the employer may not subsequently rely on the supervisor's conduct for setting aside the election." N.L.R.B. v. Decatur Transfer and Storage Inc., supra at 764.

In any event, the Company's objection was not supported by any evidence showing that Aleksiewicz's participation as an observer at the election interfered with, or in any manner prevented, a fair election. At the time of the election, Aleksiewicz's only action on behalf of the Union was his service as an election observer. There is no evidence, for example, that he improperly assisted the Union in obtaining a showing of interest, interfered with the free choice of the employees by speaking in favor of the Union, or engaged generally in coercion of employees with promises of benefit in exchange for voting pro-Union or threats of reprisal for opposing the Union in the plant. It is also clear that the Company conveyed to the employees its opposition to unionization and to the particular union seeking certification in at least two meetings which the Company president held with employees. At these meetings the Company president presented his views of the Union's claims of improved wages and working conditions. Since the Company made it evident that it wanted the employees to reject the Union, Aleksiewicz's union activity, which was limited to acting as an observer in the election, clearly did not speak for management. Each employee was free to decide for himself whether he wanted to vote for the Union, since the Company's position against unionization was well articulated even if Aleksiewicz's position was not. In such a situation

where an employer is aware of a supervisor's actions and has made its own position on unionization known, the employer will not be allowed to set aside an election on grounds that laboratory conditions have been violated. N.L.R.B. v. Douglas County Electric Membership Corp., supra, 358 F.2d at 130-131.

The Company also asserts that the election was invalid because Aleksiewicz voted without challenge. Even assuming, as the Regional Director did, that Aleksiewicz was a supervisor, a challenge to his vote would not have affected the results of the election. The mere act of voting by a supervisor, when the vote cannot affect the election result, is not a basis for setting aside an election. N.L.R.B. v. Douglas County Electric Membership Corp., supra, 358 F.2d at 127. In the instant case the Union won the election by a clear mandate of 16 to 7. Even if Aleksiewicz's vote had been challenged along with the three other challenges that occurred, the Union would have prevailed. The Company was not prejudiced by Aleksiewicz's vote, particularly in view of its own submission of Aleksiewicz's name on the list of eligible employees and subsequent failure to disclose his alleged supervisory status.

Finally, the Company claims the right to a hearing on the issue of the supervisory status of Aleksiewicz at the time of the election. The Board need not grant a post-election hearing to determine facts unless the objections to the election raise "substantial and material factual issues." Board Rules and Regulations, Sections 102.69(d), 29 C.F.R. 102.69(d). "Hearings need not be held on objections to representation elections unless by prima facie evidence the moving party presents substantial and material factual issues, which, if resolved in its favor, would warrant setting aside the election." Polymers, Inc. v. N.L.R.B., 414 F.2d 999, 1004-1005 (C.A. 2, 1969), cert. denied, 396 U.S. 1010 (1970); Lipman Motors Inc. v. N.L.R.B., 451 F.2d 823, 827 (C.A. 2, 1971).

In the case at hand the Regional Director's investigation revealed that there were no material facts in dispute, and the Regional Director assumed the truth of all the relevant factual assertions made by the Company before concluding that there was insufficient evidence of supervisory coercion to warrant setting aside the election. The Regional Director in fact assumed the existence of Alesiewicz's supervisory status in ruling that his participation as an observer did not prevent a fair election, and therefore there remains no factual dispute capable of resolution at a hearing. "Where, as here, the Board accepts the factual allegations of the Company, and no additional facts remain to be developed, a hearing in unnecessary." Polymers, Inc. v. N.L.R.B., supra, 414 F.2d at 1005; N.L.R.B. v. Joclin Mfg. Co., 314 F.2d 627, 631-632 (C.A. 2, 1963).

C. The Board properly overruled Objection 5

In Objection 5 the Company alleged that:

> The Board agent in charge of conducting the election left the ballot box unattended for a sufficiently long period of time that it was susceptible to being tampered with by others.

The Regional Director found the facts to be undisputed regarding the Board agent's handling of the ballot box. The election was conducted in two polling sessions. At the end of the first session, the Board agent properly sealed the ballot box and had Company President Gambella and the Union representative sign across the seal and the box. The sealing occurred in the presence of the two observers, the Company president, and the Union representative. The Board agent then dismantled the voting booth, packed up the election materials and started to leave the room in which the election had been held. The Company's president followed. The Company's observer had just started to leave the area, but the Union representative was still present in the room. According to the Company's observer, when she was about 25 feet from the voting area, she saw an employee point to the ballot box and simultaneously heard the Company president shout to the Board agent that he had forgotten the box. The Company's observer stated that the Board agent was probably about 25 feet from the box and that no more than 1 to 2 minutes had elapsed since the box was sealed. Company President Gambella corroborated her statement, except that he would have placed the Board agent at 50 feet from the box. Before the beginning of the afternoon voting session, the parties examined the ballot box and agreed that there was no indication that the seal had been tampered with.

The Regional Director found that this situation did not warrant setting aside an election. The ballot box was out of the physical possession of the Board agent for a maximum of two minutes. Both the Company's observer and the Union representative were in close proximity to it during that period of time, and neither of them saw any unauthorized person in the immediate vicinity of the box. The Company makes no allegation that the box was tampered with, and the Regional Director found that the box was clearly intact.

The Board has set aside an election when an unsealed ballot box remained unattended from two to five minutes;[4/] however, the mere fact that a Board agent is not attending an otherwise protected ballot box does not provide a basis upon which to set aside an election absent an allegation of actual tampering. Anchor Coupling Co., 171 NLRB 1196 (1968). The precedents in this area reflect "the principle that each possiblity [of irregularity] must be assessed upon its own unique facts and circumstances, under expert analysis by the Board, to determine whether to certify or set aside. A per se rule of possibility would impose an overwhelming burden in a representation case. If speculation on conceivable irregularities were unfettered, few election results would be certified, since ideal standards cannot always be attained." Polymers, Inc. v. N.L.R.B., supra 414 F.2d at 1004.

4/ Austill Waxed Paper Co., 169 NLRB No. 169 (1968).

Although carelessness in the handling of the ballot box should not be condoned, the expertise of the Board in determining whether an irregularity has occurred in the conduct of an election should be granted deference. As the Polymers Court stated: "The Board evaluated the possibility [of tampering]; if its expertise means anything, it should be given weight in determining, as here, whether procedures were adequate to safeguard a common part of its everyday operations." Polymers, Inc. v. N.L.R.B., supra at 1004.

Since the degree and duration of inattention in the instant case was minimal and the likelihood that tampering occurred "highly improbable", 5/ the Regional Director properly overruled the Company's objection when he found that there was no reasonable possibility of irregularity in the conduct of the election.

5/ People's Drug Stores, Inc. 202 NLRB 1145 (1973).

CONCLUSION

For the foregoing reasons, we submit that a judgment should issue enforcing the Board's order in full.

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 1st day of February, 1977